S.B. CIVIL WRIT PETITION NO.1412/2005

Sampat Ram. Vs. Puranram and others.

Date : 16.5.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. NM Lodha, for the petitioner.
Mr. Sajjan Singh, for the respondents

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Heard learned counsel for the parties.

Brief facts of the case are that the plaintiff/respondent no.1 filed a suit for specific performance of contract dated 12.4.1991 in the year 1997.

On 28.3.1998, the plaintiff submitted an application seeking amendment of the plaint. According to the plaintiff, by mistake, the property in question has been given out in the plaint as Chak No.3 SSM whereas this should have been Chak No.3 SWM. The plaintiff also sought amendment in para no.2 of the plaint on the ground that in para no.2, where Chak No.3 SSM has been given out may be permitted to be amended to Chak No.3 SLM. This application of the plaintiff was opposed by the defendant/petitioner by filing reply and the trial court vide order dated 29.8.1998 dismissed the plaintiff's application by a detail order.

While rejecting the plaintiff's application, the trial

court observed that the foundation of the suit is the agreement dated 12.4.1991 wherein there is mention of Chak No.3 SLM and if its changed description would have been Chak No.3 SWM and if the plaintiff would have sought permission to plead that because of change of 3 SLM and 3 SWM, there would not have been any difficulty in permitting the amendment. However, since there is a clear mention of Chak No.3 SSM in the agreement dated 12.4.1991 and in view of the fact that there are two different identified the land having Chak No.3 SSM and 3 SLM, the plaintiff cannot be permitted to amend the plaint because it will change nature of the suit entirely.

The above order of the trial court dated 29.8.1998 was challenged by the plaintiff by filing S.B. Civil Revision Petition No.869/1998. That revision petition was withdrawn by the plaintiff on 25.2.2003 after seeking permission to challenge the impugned order dated 29.8.1998 in appeal, if occasion arises.

The plaintiff, thereafter instead of proceeding with the suit, has again submitted an application for amendment of the plaint on 9.5.2003. This application of the plaintiff was again opposed by the petitioner but the trial court after hearing both the parties, after holding that the question of limitation raised by the petitioner is a disputed question of fact and no valuable right has accrued to the petitioner, allowed the application vide order dated 25.2.2005.

According to learned counsel for the petitioner, a bare look at the events clearly show that the amendment sought by the plaintiff is not only belated but by the time when the amendment was sought, the relief became barred by time. It is also submitted that if the amendment is allowed, then the nature of the suit will change entirely. It is also submitted that the effect of the impugned order dated 25.2.2005 is virtually setting aside the trial court's earlier order dated 29.8.1998 despite the fact that that order was not interfered by this Court in revision petition filed by the plaintiff.

Learned counsel for the respondent/plaintiff vehemently submitted that the trial court has not committed any illegality in holding that the question of limitation is a disputed question of fact and can be gone into only after evidence of the parties. The trial court only permitted amendment of the plaint and thereby no right of the petitioner has been affected. It is also submitted that allowing or permitting amendment of the plaint by the trial court is well within jurisdiction of the trial court and the order of allowing amendment can well be challenged in appeal by the petitioner, therefore, this Court may not interfere in the impugned order.

Learned counsel for the plaintiff, in support of his contention, relied upon the judgment of the Hon'ble Supreme Court in the case of Pankaja and another vs. Yellappa

(dead) by LRs. and others reported in 2004(6) SCC page 415.

I have considered the rival submissions.

It will be worthwhile to mention here that learned counsel for the plaintiff with all force submitted that the plaintiff sought amendment of plaint only and had not sought any amendment in the agreement dated 12.4.1991 despite this Court pointing out towards para 24 of the amendment application wherein the plaintiff specifically sought relief of amendment in the agreement. If the argument of learned counsel for the plaintiff is accepted that by this amendment, the plaintiff wanted to seek amendment in the plaint only, then the trial court proceeded wholly without any basis because of the reason that the trial court itself by its earlier order dated 28.9.1998 held that by amendment in the plaint by changing the description of the property, the nature of the suit will change.

If the contention of the plaintiff as mentioned in the application is accepted and it is to be treated as amendment sought for getting correction in the agreement dated 12.4.1991, then also, the trial court proceeded on wholly wrong assumption of fact as well as of law. It is clear from a complete reading of the amendment application submitted by the plaintiff dated 9.5.2003 that the only amendment has been sought by the plaintiff is that the mistake crept in the agreement dated 12.4.1991 is a mutual

mistake and that can be corrected and for that purpose, the plaintiff is amending the plaintiff. Admittedly, the date of agreement is 12.4.1991 and the application seeking relief of amendment in the agreement has been filed on 9.5.2003 after a delay of almost about 12 years. Nobody dispute these facts and the plaintiff's case is not that the suit is within limitation despite the fact that there is a gap of almost 12 years in between execution of the agreement and seeking amendment in the plaint for relief of correction of the agreement dated 12.4.1991. Met with this difficulty, learned counsel for the plaintiff submitted that the amendment will relate back to the date of the suit. Though such is not the order of the trial court and assuming for the sake of arguments that the amendment can be allowed with effect from the date of filing of the suit, then there is a gap of almost 6 years in between the agreement to sale and seeking relief and hence, there is an undisputed fact that the suit has been filed after 6 years of the execution of the agreement. Therefore, the trial court proceeded on assumption that there is a disputed question of fact when in fact, no fact is in dispute. The suit, if is treated to have been filed in the year 1997, it is barred by time is not in dispute. Therefore, the undisputed question of fact is that the relief has been sought after expiry of the period of limitation.

It will be worthwhile to mention here that there is no single word in the amendment application by which it can be said that the plaintiff laid down any foundation for

seeking exemption under any of the clauses for extension of limitation for filing the suit for correction in a document. That fact was also not taken note of by the trial court, therefore, the trial court's approach was wholly not only erroneous but virtually the trial court exceeded its jurisdiction by allowing the amendment application.

The trial court even observed that this Court in the case of Deendayal vs. Mangilal reported in DNJ 2002(3) (Raj.) page 1304 disallowed the amendment on the ground that the nature of the suit will change but in this case the trial court did not even apply its mind to the nature of the relief which has been sought by the plaintiff by filing amendment application and, therefore, the trial court despite judgment of this Court took a just contrary view to the law laid down by this Court in as much as that the plaintiff clearly sought amendment in the relief clause of the plaint and is now seeking a relief of correction in the agreement dated 12.4.1991. The trial court failed to notice that the plaintiff's suit was for specific performance of contract and in that suit, the court has discretionary power to grant relief and it is not necessary for the court to grant decree for specific performance of contract even if the Court finds that it will be lawful to grant the decree. In the suit for specific performance of contract, very many things cannot be looked into whereas if the amendment is allowed, the suit becomes virtually a suit for declaration by which the plaintiff can claim relief of declaration as a matter of right by proving the necessary

facts in his favour supported by legal position. The amended prayer will become the foundation for the suit for specific performance of contract, therefore, without there being an amendment in the agreement and consequential amendment in the plaint, the plaintiff cannot seek for specific performance. Therefore, by permitting this agreement, it is not a correction of description in the property but it will be a suit for declaration that there was a mutual mistake of the parties in describing the properties and the Court can correct that mistake in the agreement executed by the plaintiff and defendant.

All above has been virtually not looked into by the trial court which if would have been looked into, the trial court would not have gone against the judgment of this Court atleast which was cited and noticed by the trial court delivered in Deendayal's case (supra).

In view of the above, it is clear that the amendment sought by the plaintiff will change the nature of the suit and on the face of it has been sought after period of limitation. As held by the Hon'ble Supreme Court in Pankaja's case (supra), this will not be a case where if the amendment is not allowed, it will lead to multiplicity of the proceedings or it is not a case where the facts do not warrant interference of this Court in such an order as required in the facts of the case.

In view of the above discussion, this writ petition is

allowed and the order dated 25.2.2005 is set aside.

In view of the aforesaid decision, the stay order granted by this court on 14.3.2005 stands vacated and the stay petition is disposed of.

(PRAKASH TATIA), J.

S.Phophaliya